MOHD RAZALI ITHNIN v. TETUAN FATIMA TAN & CHEAH & ANOR

HIGH COURT MALAYA, MELAKA
ANSELM CHARLES FERNANDIS J
[CIVIL SUIT NO: MA-23NCVC-5-11-2019]
10 JUNE 2022

Abstract – *Section 6A(2) of the Limitation Act 1953 ('Act') allows an action to claim for damages arising from negligence other than for personal injuries to be brought within three years from the time the plaintiff could have acquired the knowledge for bringing the action and the right to bring such action if the period of three years expires later than the period of limitation prescribed in s. 6(1) of the Act. However, s. 6A(1) provides that the action is only applicable where the starting date for calculating the period of limitation under sub-s. (2) falls after the date on which the cause of action accrued.*

LIMITATION: *Cause of action – Accrual – Claim against solicitors for professional negligence – Whether limitation had set in – Whether claim time-barred – Limitation Act 1953, ss. 6(1) & 6A(2)*

CIVIL PROCEDURE: *Striking out – Application for – Claim against solicitors for professional negligence – Whether limitation had set in – Whether claim time-barred – Whether claim ought to be struck out – Rules of Court 2012, O. 18 r. 19(1)(b) & (d)*

The plaintiff was employed as a District Engineer with the Majlis Perbandaran Alor Gajah ('MPAG') before he was terminated. The plaintiff then consulted the defendants as to the decision to dismiss him. The defendants, on behalf of the plaintiff, commenced a claim at the High Court against the Yang Di-Pertua of the MPAG ('YDP'), the MPAG and the State Government of Malacca for unlawful dismissal, seeking, *inter alia*, a declaration that the plaintiff's termination was null and void ('civil suit'). The High Court, upon the application made by the YDP, the MPAG and the State Government of Malacca, struck out the plaintiff's civil suit. The plaintiff filed originating summons ('OS') for leave to file judicial review and for an extension of time to file the leave application. Again, the High Court, upon the application made by the YDP, the MPAG and the State Government of Malacca, struck out on the plaintiff's application for leave and extension of time; the plaintiff's OS was struck out the ground of *res judicata*. In the present suit, the plaintiff lodged a claim against the defendants on the ground that the defendants were negligent when, in breach of their professional duty as solicitor, they filed the civil suit instead of appealing against the decision of the Jawatankuasa MPAG and exhausting all internal remedies. In their application to strike out the present claim, pursuant to

O. 18 r. 19(1)(b) or (d) of the Rules of Court 2012, the defendants argued that the plaintiff's cause of action accrued on 4 December 2012 when the civil suit was struck out and, therefore, the plaintiff's present claim, which was filed on 28 November 2019, was filed out of time as limitation had already set in by virtue of s. 6(1)(a) of the Limitation Act 1953 ('Act').

Held (allowing defendants' application; striking out plaintiff's claim):

(1) As the plaintiff's cause of action against the defendant was grounded on the tort of negligence, the limitation period for such action was governed by s. 6(1)(a) of the Act, which was a mandatory provision that must be strictly observed. The cause of action in this case accrued on 4 December 2012. It was at this point of time that: (i) there existed a person who could sue, *ie*, the plaintiff, and another who could be sued, *ie*, the defendants; and (ii) a complete cause of action arose for the plaintiff to act against the defendants. Section 6A(2) of the Act, which allowed an action to claim damages for negligence other than for personal injuries to be brought within three years from the time the plaintiff could have acquired the knowledge for bringing the action and the right to bring such action ('starting date') if the period of three years expires later than the period of limitation prescribed in s. 6(1) of the Act, would not avail the plaintiff. The starting date used was 28 November 2013, as pleaded, or 24 July 2014, as stated in the plaintiff's affidavit in support; the period of three years from these dates would still expire before the period of limitation prescribed in s. 6(1). (paras 25-27)

Case(s) referred to:

Ambank (M) Bhd v. Abdul Aziz Hassan & Ors [2010] 7 CLJ 663 CA ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Credit Corporation (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Janagi v. Ong Boon Kiat [1971] CLJU 42; [1971] 1 LNS 42 HC ***(refd)***

Lee Kim Noor & Anor v. Julian Chong Sook Keong & Anor [2021] 8 CLJ 852 CA ***(refd)***

Lembaga Penggalakan Pelancongan Malaysia v. One Big Option Sdn Bhd [2017] CLJU 1566; [2017] 1 LNS 1566 CA ***(refd)***

Muhamad Solleh Saarani & Anor v. Norruhadi Omar & Ors [2010] CLJU 370; [2010] 1 LNS 370 HC ***(refd)***

Nadefinco Ltd v. Kevin Corporation Sdn Bhd [1978] CLJU 127; [1978] 1 LNS 127 FC ***(refd)***

Pang Yeow Chow v. Advance Specialist Treatment Engineering Sdn Bhd [2014] 8 CLJ 188 CA ***(refd)***

Petrolium Nasional Bhd (Petronas) v. Khairulniza Md Yasin & Ors [2013] 9 CLJ 1027 HC ***(refd)***

Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals [2018] 9 CLJ 425 FC ***(refd)***

United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors [1982] CLJ 547; [1982] CLJ (Rep) 358 FC ***(refd)***

Wilkinson v. Verity [1871] LR 6 CP 206 ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 54
Limitation Act 1953, ss. 6(1)(a), 6A(2)
Rules of Court 2012, O. 18 r. 19(1)(b), (d)
Rules of the High Court 1980, O. 53 r. 3, O. 92(4)

For the plaintiff - Norhalijah Yusoff; M/s Mohaji Hazury & Ismail
For the defendant - Ng Kong Peng; M/s KP NG & Amardas

Reported by Najib Tamby

JUDGMENT

Anselm Charles Fernandis J:

Introduction

[1] The plaintiff herein filed the present suit against the first and second defendants (collectively known as "the defendants"), the cause of action being professional negligence (encl. 1). The defendants applied under O. 18 r. 19(1)(b) or (d) of the Rules of Court 2012 to strike out the present suit on the sole ground that limitation had set in and the plaintiff's action was time-barred (encl. 9). This court subsequently allowed the defendants' application in encl. 9. I now give my reasons for doing so.

Brief Background Facts

[2] The plaintiff was employed as a district engineer with the Majlis Perbandaran Alor Gajah (MPAG) since 1 January 1996.

[3] At a meeting held on 29 December 2011 and chaired by the Yang Di Pertua MPAG, the Jawatankuasa Tatatertib bagi Kumpulan Pengurusan dan Professional MPAG (the Jawatankuasa) decided that the plaintiff's employment at the MPAG was to be terminated.

[4] On 6 January 2012, the plaintiff received a letter from MPAG dated 3 January 2012 notifying him of this decision. On 6 January 2012 itself, the plaintiff went to consult the defendants as to the decision to dismiss him.

[5] On 19 January 2012, the plaintiff replied to the MPAG letter dated 3 January 2012 expressing his dissatisfaction at the decision and the manner the "tatatertib" proceedings were conducted. The MPAG replied to the plaintiff's letter dated 19 January 2012 stating that as the plaintiff had failed to appeal against the decision of the Jawatankuasa within 14 days from the receipt of their letter dated 3 January 2012, the Jawatankuasa's decision was maintained.

[6] On 16 March 2012, the defendants filed Civil Suit 21NCVC-02-03/2012 at the Malacca High Court on behalf of the plaintiff against the Yang Di Pertua MPAG (YDP), MPAG and the Malacca State Government for unlawful dismissal. Among the prayers in the suit was for a declaration that his termination was null and void.

[7] On 27 April 2012, the MPAG, YDP and the Malacca State Government applied to strike out the suit under O. 18 r. 19(1)(b) or (d) or under O. 92(4) of the RHC 1980.

[8] It was contended in the striking out application that the plaintiff had failed to appeal against the Jawatankuasa's decision and therefore failed to exhaust all internal remedies before commencing the suit against them. The plaintiff's action against MPAG, YDP and the Malacca State Government was also challenged on the ground that the plaintiff should have challenged the decision of the Jawatankuasa by way of judicial review as the decision was from a public body.

[9] On 4 December 2012, the High Court allowed the MPAG, YDP and the Malacca State Government's application to strike out the plaintiff's writ and statement of claim. The plaintiff did not appeal against the decision of the High Court.

[10] On 19 February 2013, the plaintiff filed Originating Summons 24NCVC-80-02-2013 for leave to file judicial review and for an extension of time to file the leave application. The application was made under O. 53 r. 3 of the then RHC 1980 which required an application for judicial review to be made within 40 days of the decision being communicated to the plaintiff.

[11] On 3 July 2013, the MPAG, YDP and the Malacca State Government applied for the plaintiff's application for leave and extension of time be struck out.

[12] On 28 November 2013, the plaintiff's application under Originating Summons 24NCVC-80-02/2013 was struck out on the ground of *res judicata*.

[13] On 28 November 2019, the plaintiff filed this present suit against the defendants for professional negligence.

The Plaintiff's Case

[14] The cause of action of the plaintiff against the defendants was that the defendants were negligent when, in breach of their professional duty as competent solicitors, they filed civil suit *ie*, Civil Suit 21NCVC-02-03/2012 instead of appealing against the decision of the Jawatankuasa MPAG and exhausting all internal remedies there to. This consequently resulted in the Civil Suit 21NCVC-02-03/2012 being struck out on 4 December 2012 and also culminating in the subsequent Originating Summons 24NCVC-80-02/2013 being struck out on 28 November 2013.

[15] This is reflected in paras. 21, 22 and 23 of the statement of claim read as follows:

> 21. Apabila menerima surat dari pihak MPAG bertarikh 3.2.2012 tersebut, Plaintif memplidkan bahawa beliau telah menemui defendant-defendant untuk mendapatkan nasihat perundangan dan Plaintif telah dinasihati

dan diberikan penerangan oleh defendant Kedua bahawa langkah yang perlu diambil selanjutnya ialah membawa tindakan ini ke Mahkamah Tinggi.

22. Pada ketika itu, Plaintif yang merupakan orang awam yang tidak mempunyai pengetahuan mendalam tentang undang-undang dan soal teknikal perundangan tidak mengetahui bahawa sepatutnya defendant defendant menasihatkan Plaintif untuk membuat rayuan kepada Jawatankuasa Rayuan Tatatertib melalui Ketua Jabatan seperti dinyatakan dalam perenggan 3 surat keputusan pertuduhan disiplin MPAG dalam tempoh ditetapkan supaya semua perkara yang tidak berpuas hati di pihak Plaintif akan dipertimbangkan oleh Jawatankuasa Rayuan Tatatertib dan proses rayuan ini adalah sebenarnya satu proses wajib dan mandatori yang perlu diikuti Plaintif menurut undang-undang sebelum sesuatu kes Permohonan Semakan Kehakiman dapat difailkan di Mahkamah.

23. Namun sayangnya semua perkara di atas tidak dinasihatkan oleh defendant defendant kepada Plaintif menyebabkan peluang rayuan telah disia-siakan begitu sahaja dan menjejaskan semua tuntutan dan cabaran kes yang difailkan di Mahkamah Tinggi selepas itu.

39. Selepas kes Plaintif dibatalkan oleh Mahkamah Tinggi Melaka yang mana perkara itu hanya dimaklumkan kepada Plaintif oleh defendant-defendant setelah sekian lama defendant-defendant menyepi tanpa sebarang Notis bertulis diberikan kepada Plaintif, barulah Defendan-Defendan memaklumkan pula kepada Plaintif bahawa langkah atau mod tindakan atau kaedah pemula yang sepatutnya digunakan oleh defendant-defendant bagi pihak Plaintif untuk mencabar keputusan Mesyuarat tersebut adalah permohonan semakan kehakiman yang perlu difailkan dalam tempoh masa 40 hari dari tarikh keputusan tersebut dimaklumkan kepada Plaintif mengikut Aturan 53 Kaedah-Kaedah Mahkamah Tinggi 1980 pada ketika itu.

[16] It was further pleaded by the plaintiffs that they only knew of the defendant's negligence after 28 November 2013 without specifying any particular date (see para. 60 of the statement of claim).

[17] The plaintiff had for the first time, in their affidavit in reply, asserted that it was only on 24 July 2014 that he knew that the application for extension of time was struck off on the 28 November 2013. This fact was never pleaded by the plaintiff in any of their pleadings. This part of the submission is reflected at para. 6 encl. 11:

6. Saya menyatakan di sini setelah dinasihati oleh peguamcara saya yang saya percayai benar bahawa Permohonan Defendan-defendan dalam lampiran 9 tersebut merupakan satu permohonan yang mengaibkan, remeh dan menyusahkan yang dibuat dengan tujuan untuk melambatkan pelupusan penuh tindakan ini dan dengan niat untuk menafikan hak saya terhadap relif-relif yang dituntut oleh saya dalam Writ Saman dan Pernyataan Tuntutan yang bertarikh 28.11.2019 kerana tuntutan saya

A terhadap Defendan-defendan adalah tidak terhalang oleh had masa memandangkan kerugian serta kehilangan peluang saya untuk mencabar keputusan Mesyuarat Tindakan Tatatertib tersebut disebabkan kecuaian Defendan-defendan *hanya bermula selepas saya mengetahui pada 24.7.2014 bahawa permohonan semakan kehakiman yang difailkan oleh Defendan-defendan bagi pihak saya ditolak oleh Mahkamah pada 28.11.2013 di mana saya hanya*
B *mengetahui berkenaan perkara tersebut setelah saya diserahkan kertas-kertas kausa oleh Defendan-defendan pada 26.6.2014 dan 24.7.2014* selepas kertas-kertas kausa tersebut di minta oleh saya melalui surat saya kepada Defendan-defendan bertarikh 23.6.2014 dan melalui surat peguamcara saya iaitu Tetuan Mohaji Hazury & Ismail bertarikh 16.7.2014 dan 23.7.2014.

(emphasis added)

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[18] The plaintiff thus asserted in their submission that time started to run from 28 November 2013 when the plaintiff's OS24NCVC-80-02/2013 was struck out. According to the plaintiff, limitation would only then set in on 28 November 2019. Otherwise, it was submitted limitation would set in six
D years after he first came to know of the High Court decision in dismissing OS 24NCVC-80-02/2013 *ie*, on 24 July 2020. The present suit was filed on 28 November 2019 and was therefore within time. This is clearly stated in the plaintiff's submission at p. 5 para. 8 encl. 14:

Justeru, Plaintif memplidkan bahawa had masa untuk Plaintif memfailkan
E tuntutan terhadap Defendan-defendan bagi kecuaian yang dilakukan oleh Defendan-defendan hanya akan tamat selepas 28.11.2019 iaitu selepas tempoh 6 tahun dari tarikh Mahkamah menolak permohonan semakan kehakiman yang difailkan oleh Defendan-defendan bagi pihak saya pada 28.11.2013 atau 6 tahun selepas Plaintif mengetahui berkenaan keputusan Mahkamah Tinggi Melaka pada 28.11.2013 yang menolak permohonan
F semakan kehakiman yang difailkan oleh Defendan-defendan bagi pihak Plaintif atas nasihat dan perwakilan oleh Defendan-defendan dalam prosiding kes No. 24-NCVC-80-02/2013 pada 24.7.2014 di mana sekiranya dikira dari tarikh 24.7.2014, had masa untuk Plaintif memfailkan tuntutan terhadap Defendan-defendan bagi kecuaian yang dilakukan oleh Defendan defendan hanya akan tamat selepas 24.7.2020.

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The Defendants' Case

[19] It was the defendants' contention that the plaintiff's cause of action accrued on the 4 December 2012 when the plaintiff's Civil Suit 21NCVC-02- 03/2012 was struck out.

H **[20]** Learned counsel for the defendants submitted that the plaintiff's claim was filed out of time and that limitation had already set in by virtue of s. 6(1)(a) of the Limitation Act 1953.

[21] It was the defendants' contention that the six years' limitation period
I would have expired on 3 December 2018. This present action was filed on 28 November 2019 which was more than six years after the cause of action arose and was therefore time-barred.

The Law On Striking Out

[22] The power of the court to allow a striking out application is found under O. 18 r. 19(1) of the ROC 2012.

[23] Under O. 18 r. 19(1) the court may at any stage of the proceedings strike out any pleading on the ground that it discloses no reasonable cause of action, is scandalous, frivolous or vexatious; and/or is an abuse of the process of the court.

[24] The guiding principles upon which the court exercises its power under any of the four limbs of O. 18 r. 19(1) of the ROC are well settled; it is only in plain and obvious cases that a defendant may have recourse to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable (see: *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 and *Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals* [2018] 9 CLJ 425).

Findings Of The Court

[25] As plaintiff's cause of action against the defendants is grounded on the tort of negligence the limitation period for such action is governed by s. 6(1)(a) of the Limitation Act. The relevant part of which states as follows:

> 6 Limitation of actions of contract and tort and certain other actions
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of **six years from the date on which the cause of action accrued, that is to say**:
>
> (a) actions founded on a contract or on tort;
>
> (b) ...;
>
> (c) ...;
>
> (d) ...
>
> (2) ... (emphasis added)

[26] Section 6(1)(a) of the Limitation Act 1953 is mandatory provision which must be strictly observed. This is laid down in *Muhamad Solleh Saarani & Anor v. Norruhadi Omar & Ors* [2010] CLJU 370; [2010] 1 LNS 370; [2010] 9 MLJ 603 at p. 603 where the High Court held as follows:

> *The period of limitation as contained in s. 6(1)(a) of the Act is mandatory and must be strictly observed unless there are sufficient facts to bring it within the exception as provided under s. 29(b) of the Act, which is not the case in the present case.*
>
> (emphasis added)

[27] After perusing the affidavits and written submissions filed herein and hearing submissions from both parties, I find that the cause of action in this case accrued on 4 December 2012. It was at this point of time that there existed a person who can sue, in this case the plaintiff, and another who can be sued, in this case the defendants. It was also at that point of time that a complete cause of action arose for the plaintiff to act against the defendants.

[28] In this respect, I am guided by the case of *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69; [1991] 1 MLJ 409 as to when a cause of action is said to accrue, there the Supreme Court held that:

> From established authorities we can now accept that the cause of action normally accrues when there is in existence **a person who can sue and another who can be sued**, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.
>
> (emphasis added)

[29] From the undisputed facts of this case, I find that the failure of the defendants to appeal against the Jawatankuasa's decision and to exhaust the internal remedies available and thereto to commence action against MPAG by way of judicial review, as was the plaintiff's pleaded case, constituted the root cause of all the subsequent circumstances faced by the plaintiff culminating in OS-24NCVC-80-02/2013 being struck out. The filing of OS24-NCVC-80-02/2013 was therefore a mere consequence of the failure in Civil Suit 21NCVC-02-03/2012.

[30] In *Nadefinco Ltd v. Kevin Corporation Sdn Bhd* [1978] CLJU 127; [1978] 1 LNS 127; [1978] 2 MLJ 59, the Federal Court was of the view that the cause of action in that case accrued the instant the mining company failed to pay the first instalment due and therefore the action was barred by limitation, the action was commenced more than six years after the cause of action arose. The Federal Court referred with approval to the general rule as stated by Willes J in the court of common pleas in *Wilkinson v. Verity* [1871] LR 6 CP 206, 209 as follows:

> It is a general rule that where there has once been **a complete cause of action** arising out of contract or tort, the statute [of limitation] begins to run, and that **subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded**. As, for instance, in the case of a bill of exchange drawn at so many months after sight, and refused acceptance, the cause of action is complete and the statute begins to run upon the refusal of acceptance, and no new cause of action arises upon refusal of payment.
>
> (emphasis added)

See: also *Lembaga Penggalakan Pelancongan Malaysia v. One Big Option Sdn Bhd* [2017] CLJU 1566; [2017] 1 LNS 1566.

[31] I am also of the view that the plaintiff had suffered actual damage upon Civil Suit 21NCVC-02-03/2012 being stuck out. A

[32] In *Lee Kim Noor & Anor v. Julian Chong Sook Keong & Anor* [2021] 8 CLJ 852 the Court of Appeal held as follows:

> [33] We are of the considered opinion that a cause of action in tort arises when the plaintiffs suffered damage. The issue of when the cause of action for a tort arises, was dealt with, in *AmBank (M) Bhd v. Abdul Aziz Hassan & Ors* [2010] 7 CLJ 663; [20101 3 MLJ 784 where the Court of Appeal held that: B
>
> [34] It is trite law that a *cause of action founded in tort accrues when the appellant suffers damage* (*Goh Kiang Heng v. Hj Mohd Ali bin Hj Abd Majid*). C
>
> [35] According to the case of *Forster v. Outred & Co (a firm)* [1982] 1 WLR 86 (CA), *it was necessary to prove actual damage in order to constitute a cause of action in negligence and that on the pleaded facts the plaintiff had suffered actual damage through the defendant's negligence* by executing a mortgage deed whereby her property was encumbered with a legal charge and she was subjected to a liability which might mature into a financial loss; and that, therefore, her cause of action accrued in February 1973 notwithstanding that she did not actually become liable for the repayment of the loan until the demand was made and, accordingly, the second writ was issued outside the six years' limitation period and the action begun by the first writ was rightly dismissed. D E
>
> (emphasis added)

[33] In this present case, the plaintiff would have suffered actual damages on the striking out of Civil Suit 21NCVC-02-03/2012 on 4 December 2012 as the decision of the Jawatankuasa to terminate his services remained intact and he would no longer avail himself to any remuneration and benefits of his former employment from the time his services were terminated. It was at this juncture that time began to run. F

[34] It is noteworthy that the plaintiff himself had claimed damages *ie*, loss of income and benefits for the period even before the civil suit was struck out on 4 December 2012, that is since September 2011 up to December 2031 as can be seen in para. 64 of the statement of claim. Thus, it is the pleaded case of the plaintiff that he had suffered actual damages throughout 2012. G

[35] As for the plaintiff's contention that the cause of action accrued only on the 28 November 2013, which I find it had not, it would still be time-barred as the last date before limitation setting in would be 27 November 2019 and not 28 November 2019. H

[36] Support for this finding can be found in the case of *Muhamad Solleh Saarani & Anor v. Norruhadi Omar & Ors* [2010] CLJU 370; [2010] 1 LNS 370 [2010] 9 MLJ 603, the brief facts being that the plaintiff sued the defendant for damages and loss suffered in a motor vehicle accident caused by the I

negligence of the defendant. The suit was filed on 21 May 2004. The accident occurred on 21 May 1998. The High Court held that the plaintiffs' cause of action, which was filed on 21 May 2004, was time-barred on 20 May 2004. In deciding so the High Court held that the Limitation Act is special law and is a complete code by itself, which excludes the operation of or the benefit of calling in the aid of the Interpretation Acts 1948 and 1967 (in particular s. 54 of the Act) to construe the period of limitation prescribed in s. 6(1)(a) of the Act. The language of s. 6(1)(a) of the Act is plain and clear and refers to the period of limitation starting from the date when the cause of action arose.

[37] Reference is also made to the case of *Petrolium Nasional Bhd (Petronas) v. Khairulniza Md Yasin & Ors* [2013] 9 CLJ 1027; [2014] 10 MLJ 397 where the High Court made the following observations as to when a six-year limitation period end:

> At this point of time, 2 November 1999, the breach occurred and the repayment of the loan became due under cl 3 of the agreement. **Therefore the six years limitation period should commenced on 2 November 1999 and end six years later on 1 November 2005**. Since Petronas's claim was filed on 21 October 2005, it was still within time and not barred by the six years' limitation.
>
> (emphasis added)

[38] In respect of the plaintiff's alternative assertion that the cause of action only accrued on 24 July 2014 when they first had knowledge or knew that OS-24NCVC-80-02/2013 was struck out, it is my view that in determining as to when the alleged cause of action in contract and in tort first accrued against the defendants, the date as to when the plaintiff discovered the alleged cause of action is irrelevant. In *Ambank (M) Bhd v. Abdul Aziz Hassan & Ors* [2010] 7 CLJ 663; [2010] 3 MLJ 784, the Court of Appeal while comparing the law as to limitation in England opined as follows:

> So the position, in Malaysia, remains the same and that would be that **limitation runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage**.
>
> (emphasis added)

This position was recently reaffirmed by the Court of Appeal in *Lee Kim Noor & Anor v. Julian Chong Sook Keong & Anor* (*supra*).

[39] Further to the matters discussed above and as mentioned previously, the particular fact as to the date of accrual being 24 July 2014 was never pleaded by the plaintiff. In this respect I need only refer to the case of *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 2 MLJ 152 at 155 where the Supreme Court agreed with Sharma J (as he then was) in *Janagi v. Ong Boon Kiat* [1971] CLJU 42; [1971] 1 LNS 42 on the function of pleadings and the duty of the court to follow it:

The court is not entitled to decide a suit on a matter which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, *it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings*. The trial of the suit should be confined to the pleads on which the parties are at variance.

(emphasis added)

[40] This proposition of law becomes more significant where the issue at hand involves the question of limitation. In *Pang Yeow Chow v. Advance Specialist Treatment Engineering Sdn Bhd* [2014] 8 CLJ 188, the Court of Appeal made the following pertinent observation in respect of pleadings where limitation was an issue:

[10] **When limitation issues are taken, the pleadings must be meticulously looked into** ...

[12] What is important to note is that the complaint is in reference to a number of dates in prayer 18(a) and one particular date where the respondent admit the breach took place was on 29 May 2006 and nowhere in the pleaded case of the respondent has the date 12 November 2006 been mentioned for the trial court to endorse the claim and allow damages.

[13] **It is trite judgment must reflect the pleadings and more so when 'limitation' is taken as an issue**. Learned authors of *Clerk & Lindsell on Torts*, 20th edn. at p. 2064 had this to say:

> As limitation is a defence, one might have expected the burden of proof to lie with the defendant. But the authorities established that the burden of proving that the case falls within the limitation period is on the claimant.

[14] We have perused the pleadings several times but could not find the date 12 November 2006 in the statement of claim to enable the respondent to prove the cause of action falls within the limitation period. In our considered view it is fatal to the respondent's case.

(emphasis added)

[41] Apart from this, it is also trite law that the omission in the pleadings of the plaintiff cannot be made good by affidavit evidence. See *United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1982] CLJ 547; [1982] CLJ (Rep) 358.

[42] Quite separate from the issue of the omission in the plaintiff's pleadings I had also, for the sake of completeness, considered the recently introduced s. 6A of the Limitation Act 1953 which came into force on 1 September 2019 *ie*, before the present action was filed. Section 6A reads as follows:

A

> 6A. (1) Notwithstanding subsection 6(1), this section shall apply to any action for damages for negligence not involving personal injuries, where the starting date for calculating the period of limitation under subsection (2) falls after the date on which the cause of action accrued.
>
> (1) An action to which this section applies shall not be brought after the expiration of 3 years form the starting date if the period of 3 years from the starting date expires later than the period of limitation prescribed in subsection 6(1).

B

[43] I am of the view that s. 6A(2) of the Limitation Act 1953 allows an action to claim damages for negligence other than for personal injuries to be brought within three years from the time the plaintiff could have acquired the knowledge for bringing the action and the right to bring such action ("the starting date") if the period of three years expires later than the period of limitation prescribed in sub-s. 6(1) of the same Act. Section 6A(1) provides that the section is only applicable where the starting date for calculating the period of limitation under sub-s. (2) falls after the date on which the cause of action accrued.

C

D

[44] In my view, s. 6A would not avail the plaintiff because whether the "starting date" used was 28 November 2013 as pleaded or 24 July 2014 as stated in their affidavit in support, the period of three years from these dates would still expire before period of limitation prescribed in sub-s. 6(1).

E

Conclusion

[45] In the upshot, for all the reasons cited above, this court is of the view that it is plain and obvious the claim by the plaintiff against both defendants was caught by limitation. I therefore allow the defendants' application in encl. 9 and strike out the plaintiff's claim against the defendants.

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